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PROPERTY LAW 2022

VOLUME TWO
CHAPTERS 8 - 11

Jim Phillips
Faculty of Law
University of Toronto

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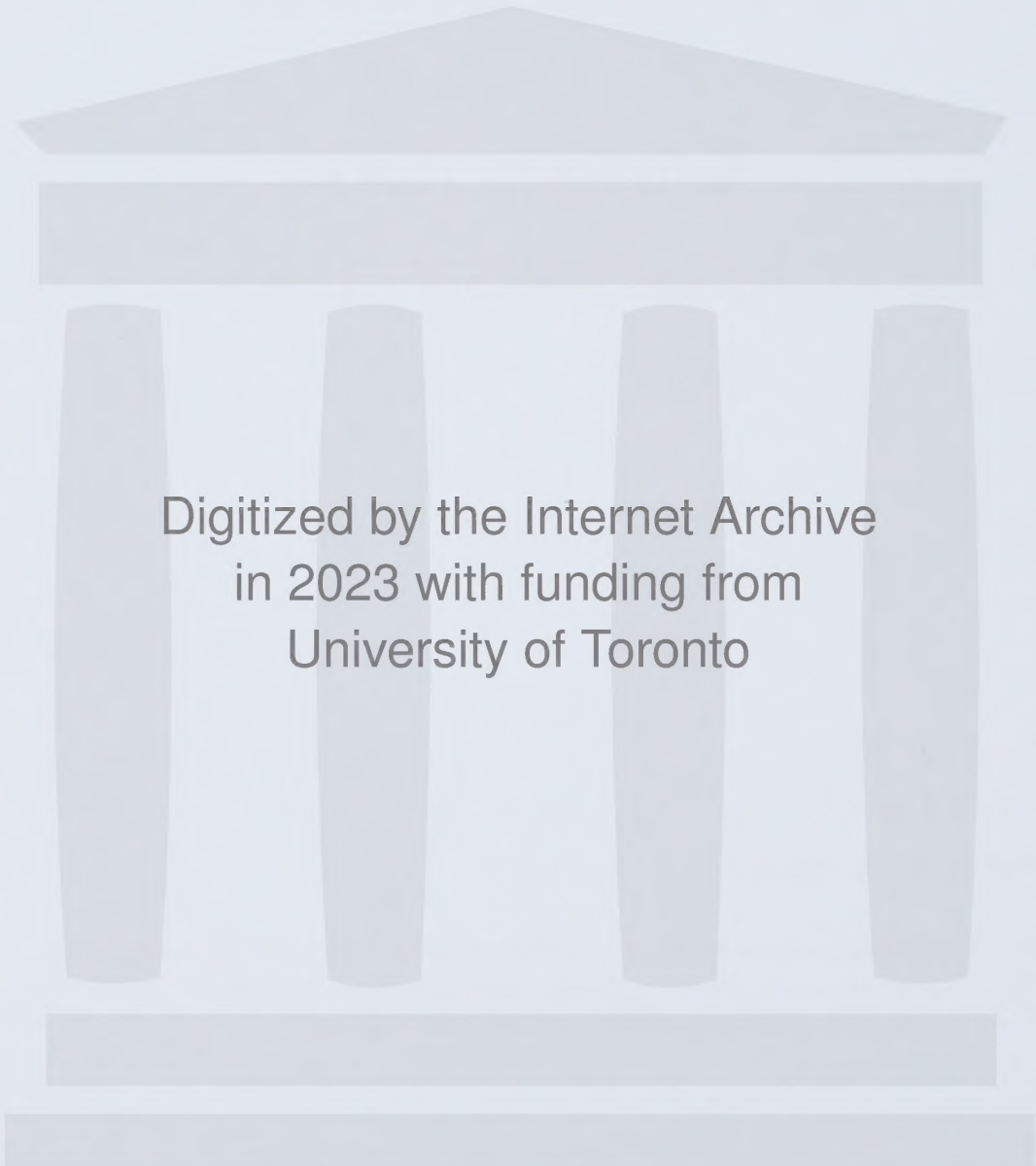

CHAPTER 8 - DE FACTO EXPROPRIATION

PROPERTY, POLITICS, THE CONSTITUTION AND THE STATE

INTRODUCTION

It is a commonplace of political philosophy that the western liberal tradition places great emphasis on the freedom of the individual. This freedom is often discussed in terms of freedom from control by others, especially the state. It is also often contended that private property serves a crucial role in protecting and enhancing such freedom. The enhancement of individual liberty is therefore often cited as a justification for private property in general. More particularly, it also serves as an argument for putting into private hands as many as possible of the strands in the bundle of rights that property represents.

Some commentators also point out that while private property gives those who have enforceable claims to resources power over their own lives, it also gives them power over the lives of others. Moreover, they argue, too great an emphasis on private property runs the risk of countering society's collective goals.

Our socio-economic system obviously balances the private and the public through taxation. We achieve collective goods by taxing, and we then go a step further and construct systems of progressive taxation – high earners pay a higher rate of tax on income about a certain threshold. This chapter is principally about another way in which we redistribute resources through state action – by regulating uses of private property. The law does this in many ways, through court

rulings and through statutes. We have seen one example in chapter 4 - the debate over property rights and discrimination – and there are many others.

This chapter cannot possibly cover all the ways in which we intervene in a regime of private property, limiting the private owner's rights for the public good or for the private interests of others. It principally considers only one small area – what is known as *de facto* expropriation in Canada. In the United States the area is known as regulatory takings. What do we mean by *de facto* expropriation? It is easiest to explain this by briefly discussing expropriation, without the qualifying *de facto*. In all western countries, including Canada, it is possible for the state to take title to your property, invariably land, for public projects – highways, airports, and many other things. We call this expropriation. The federal jurisdiction and all provinces have an *Expropriation Act* which says what procedures must be followed when the government decides to do this. All these statutes also provide a right to compensation. Strictly speaking we should call this *de jure* expropriation, because the legal title to the land has passed from the citizen to the state.

A *de facto* expropriation occurs when the state does not take the title to some person's property. Rather the state regulates the uses of property to such a degree that it can be argued that it has effectively taken property. Imagine that Ontario passes a statute which nowhere states that it is taking title to your land. Rather the statute says that you cannot lease or sell the land to another, you cannot build on it or develop it in any way, and you cannot use it for any activity, from playing soccer to building to, horror of horrors, riding bicycles. You would surely argue that even though the state has not taken your title, it has rendered the land useless, reduced its value to nothing, taken away all uses, so that overall the regulation of the land is tantamount to expropriation, it is a *de facto* expropriation.

This extreme example helps explain what a *de facto* expropriation is, but it does not tell us whether on a particular set of facts a court will say that a *de facto* expropriation has occurred. Change the facts of my example. The statute says that you cannot lease the land, but you can sell it, that you can build a house but you cannot develop it in any other way, and that you can use it for private, non-commercial activities like playing soccer and riding bicycles but not commercial ones like running a camp or a stables. You have lost some of your rights in the land, but nothing like as many as in the first example. Is this tantamount to expropriation? The answer in Canada is no – many of the things mentioned are the kinds of things that are covered by land use planning legislation or zoning. We deal with this kind of thing through the political system, not by going to court and arguing that property has been taken.

Where the line is drawn between a valid regulation which requires no compensation to be paid to a property owner and a *de facto* expropriation which does require compensation varies from one society to another. It is very difficult to make a successful claim for *de facto* expropriation under Canadian law. In this chapter we read all four of the leading cases, which tell us when a *de facto* expropriation occurs. They also tell us why the test is a strict one.

Before we look at the Canadian cases we will briefly examine American law, to contrast the two. An obvious difference between the U.S. and Canada in this area is that the former has a constitutional

protection for property, while Canada does not. The Fifth Amendment to the U.S. constitution reads in part: "nor shall any person ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." This makes the right to compensation a constitutional right. But in truth in Canada also there is a similar "right" to compensation embedded in the general political culture. In Canada it is theoretically possible for the state to take title to a person's property without compensating him or her in any way. But we all know that this would be politically impossible, be widely viewed as the government not acting legitimately.

Where the major difference between the U.S. and Canada lies is in when a *de facto* expropriation, or regulatory taking as it is called in the U.S., has occurred. There have been dozens of regulatory takings cases decided by the U.S. Supreme Court in the twentieth and twenty first centuries – itself an indication of how much more possible it is to make a successful claim in the U.S.

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THE LINE BETWEEN REGULATION AND TAKING: THE UNITED STATES

The first two "regulatory takings" cases are from the USA. We are not concerned here with the intricacies of the law relating to what a public purpose is or to how compensation is calculated. The *Pennsylvania Coal* and *Keystone* cases are about whether the government has taken property at all. If it has not, no compensation need be paid. This may sound like an easy question, but the cases show that it is not. What causes the difficulty is that almost any regulation by government of any aspect of social or economic life will affect in some way the property rights of some person or persons. Anti-pollution laws, for example, limit what uses an owner can make of land and in that sense remove a strand from the owner's bundle of rights. But this is not considered a taking - or at least not generally so, for one can find, in the US, people who say that practically any regulation is a taking.

But if "all regulations are takings" is too extreme a position, it is also the case that most people would agree that the converse - regulation can never amount to a taking - is also too extreme. This position would state that the government does not "take" from the citizen unless it acquires title to land or personal property. But this would permit the state to prohibit every use, and thereby render ownership worthless, without paying compensation.

So the question in the cases is - where between these two extremes is the line to be drawn? In reading these cases do not be confused by the term "police power". It is a term of art in US constitutional law meaning the power of the states to regulate private conduct in the interests of public health, welfare and safety.

The area of regulatory takings is a large and complicated one in the US, and it is not my purpose to cover it comprehensively or indeed to provide an up-to-date analysis of it. The two cases excerpted are here for different reasons. *Pennsylvania Coal* is here because it is considered the origin of the

modern, twentieth-century approach to regulatory takings, the case that signalled a more interventionist approach by the US Supreme Court. As Justice Stevens says in 1987 in *Keystone*, "[t]he two factors that the Court considered relevant [in *Pennsylvania Coal*] have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, ... or denies an owner economically viable use of his land' ".

The second case, *Keystone*, is included in part because it obviously involves a revisiting of essentially the same issue that was at stake in *Pennsylvania Coal*. More importantly, it demonstrates a sharp disagreement within the US Supreme Court over when the court ought to require compensation for regulation, a disagreement in large measure based upon how the two camps decide to define "property" for these purposes. Hence the issue that we considered in chapters 1 and 2 - what do we mean by property - turns out to be crucial.

For the majority in *Keystone* the property held by the coal company is all of the coal deposits available to it. They are thus able to say that the regulation affects only a small part of the complainant's property. Conversely, the dissenting judgment defines property as each individual strand in the bundle of rights; they are thus able to say that the regulation "takes" all the property in the strand - both all of the 27 million tons of coal and all of the "support estate". There are clearly other differences between the two judgments also, especially in the emphasis each would give to the public interest.

The *Keystone* case discusses a "support estate." Pennsylvania is unique among common law jurisdictions in recognising three estates - surface, mineral, and support. It is not uncommon in common law jurisdictions to separate the first and the second, to give mineral extraction rights to a person other than the fee simple holder of the rights to the surface, but normally the first and the third go together. The holder of the right to use the surface also has the right to have it supported, and this necessarily limits any underground activity. But because, as *Pennsylvania Coal* tells you, in the nineteenth century coal operators sold land above which they were working to individuals, and because the contracts of sale included a term exempting the coal operator from any liability should the mining cause the surface to subside, the courts recognised the coal operators' interest as a "support estate." The term is a bit of a misnomer, because in holding the support estate the coal companies could choose to support or not - it is therefore in effect a right to cause the surface to subside. That is all you need to know about it, but note that it does become important because the dissenting judgment depicts the support estate as a separate interest in land that is effectively expropriated by the regulations at issue.

The *Keystone* case is far from the latest word on the subject. But it is here because it demonstrates the sharp divergence between liberals and conservatives on this issue. The US Supreme Court has gone back and forth since *Keystone*, and in the last few years, especially the last year, has taken a turn to the right. The minority position in Keystone is firmly in the majority since the appointment of Justices Gorsuch, Kavanaugh and Barrett. The most recent case on regulatory takings is *Cedar Point Nursery v. Hassid*, a June 2021 decision. In 1975 the California legislature passed the California Agricultural Labour Relations Act to help union organisers gain access to agriculture

CHAPTER NINE

INDIGENOUS PEOPLE AND CANADIAN PROPERTY LAW

INTRODUCTION

This chapter provides a necessarily brief introduction to the subject of Indigenous (aboriginal) people and Canadian property law. Although Indigenous is for many people the preferred word these days, the modern cases on Indigenous title to land call it aboriginal title and this chapter will do the same.

There are two principal topics in this chapter. The first is 'Indian' (the term still used) reserves, and the second is aboriginal title. The difference between them is that Indian reserves are a creation of the Canadian state, or of the colonies that later became the Canadian state, while aboriginal title is a recognition in Canadian law that Indigenous people have a title to their land that is derived from their occupation of the land at the time that British sovereignty over the territory was asserted, that is, it existed before colonies were established and certainly before Canada was founded in 1867. The basis of that title, and its content, are issues within Canadian law, and many Indigenous peoples do not accept what courts and legislatures have said about

ABORIGINAL TITLE AND THE CONSTUTION ACT: INTRODUCTIOON

By the time we get to this chapter some, I suspect most, of you will have done the general subject of aboriginal rights in constitutional law. Some of you will have done aboriginal title as part of that. This makes sense. As we have seen aboriginal title is part of the Canadian law of property, and indeed it is a common law concept, not a constitutional one, in its origins – see *Calder*. Since 1982 aboriginal rights, including aboriginal title, have been entrenched in section 35 of the Constitution. As a result, aboriginal title has become a constitutional issue as well as a matter of property law. The leading Supreme Court of Canada case on aboriginal title, *Delgamuukw,* brings together the common law of aboriginal title and the constitution.

Reference has been made here to both aboriginal *title* and aboriginal *rights*. The former is now seen as one form of the latter. According to the Supreme Court of Canada in *R.* v. *Van der Peet*, "aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land." In this definition, therefore, "aboriginal rights" is a general term, and "aboriginal title" is a specific instance of an aboriginal right. However, in some cases "aboriginal rights" is, confusingly, also a term that refers to specific land use rights, less than title - for example, a right to hunt or to fish.

The first major statement on the content of aboriginal title from the Supreme Court of Canada came in *Delgamukkw v. The Queen,* immediately below. The fact that section 35 of the *Constitution Act* was enacted between the two cases means that understanding *Delgamuukw* requires an understanding of the landmark SCC cases on section 35 and aboriginal rights generally, which were decided before *Delgamuukw*. These cases have or will be studied in your constitutional law course, but to make sure you fully understand *Delgamuukw* I will summarise them here. It is a necessarily brief and superficial summary, but it will do for the purposes of the Property course.

The first of these cases was *R. v. Sparrow*, decided in 1990. Sparrow was not an aboriginal title case, but one involving a claim of a right to fish in a section of the Fraser River. The court more or less assumed that there was an aboriginal right, and thus did not discuss the test for establishing one. The importance of the judgment lies in two other areas.

First, as to which rights were protected under s. 35, the court held that only 'existing' rights were protected, that is, those existing in 1982. Thus a right that had existed some time in the past but which had been extinguished before 1982 was not protected. In turn that finding made the definition of extinguishment important. The court held that regulation, even very extensive regulation, of a right did not amount to its extinction. For extinguishment to take place the intention of the crown to do so must be "clear and plain." As we will see, this was the test first enunciated in *Calder*.

Second, the court held that the fact that aboriginal rights were "recognised and affirmed" by s. 35 did not mean that they could not in future be regulated. Federal legislative power derived from s. 91 continues. But the ability of governments to infringe on aboriginal rights was guided by the

crown's fiduciary duty towards aboriginal peoples. The court said: "the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial." Thus the court extended the notion of a fiduciary duty towards aboriginal people from the particular context of surrender of reserve land (*Guerin*) to the entire relationship between the crown and aboriginal peoples. The consequence of this is that governments must justify any regulations which infringe on or deny aboriginal rights. There is more on the justificatory scheme below, in the section on "Infringements of Aboriginal Title."

The other significant case decided before *Delgamuukw* was *R. v. Van der Peet*. In this case the court laid down the test for deciding whether a particular practice was an aboriginal right. *Van der Peet* was not an aboriginal title case, not a case about a right to the land itself, but a right to make use of a resource. In *Delgamuukw* the Supreme Court partly defined aboriginal title by stressing the differences between an aboriginal right and aboriginal title, so it is useful to know what was said about the test for an aboriginal right in *Van der Peet*.

First, it held that "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."

Second, it said that the time to assess whether a practice met this test was as of first contact with Europeans.

Third, it held that aboriginal rights claims must be adjudicated on specific basis, not in general. A practice might meet the test for one group, the same practice might not do so for another.

Each of these three issues is discussed in *Delgamuukw*. First, as you will see, the court rejected the "integral to a distinctive culture" test for aboriginal title. Aboriginal title is more than this, it is a right in the land itself, arising from historic occupation, yet it is not a full fee simple. Second, in defining what aboriginal title is, the court gave a general definition, not one specific to any particular society. Third, the test for when aboriginal title is to be established is the moment of British sovereignty; there must be occupation of the land at sovereignty, not at the time of first contact between aboriginal peoples and Europeans.

CHAPTER TEN

LANDLORD AND TENANT LAW: THE COMMON LAW AND THE COMMERCIAL TENANCIES ACT

INTRODUCTION TO THE LEASEHOLD RELATIONSHIP

The principal characteristic of the landlord-tenant relationship at common law is that the leasehold interest is conceived of as an estate in land. While the relationship of landlord and tenant is created by contract, the relationship itself is not a contractual but a "property" relationship. In this sense it is the same as the relationship between a buyer and seller of land; they may contract to buy and sell, but once they have done so they are not in a continual contractual relationship that may modified by negotiation or even breached. The buyer has an estate and can exclude the seller, neither vendor nor purchaser can change his or mind once the deal is finalized, and dealings between the two are at an end.

So too in the classical conception of the leasehold estate. Once the tenant has the lease he or she has an estate and the absolute right to exclusive possession against all the world, including the landlord, for so long as the term of the lease provides. All the landlord has is the reversion - the right to retake possession and full rights when the tenant's estate is at an end. The very term used here – reversion – makes the point about the leasehold being an estate. It is the same interest that a fee simple owner has when he or she grants a life estate; he or she has only the right to retake possession when the life estate ends.

The landlord-tenant relationship is thus a relationship created by contract, express or implied, in which a person with an interest in real property - the landlord or lessor - grants a lesser interest in that property to the tenant or lessee. The technical term for lease is demise, and the leased land is often referred to as the "demised premises". The lesser interest demised is that of exclusive possession of land for a definite period of time. A leasehold estate cannot be of uncertain duration.

If an agreement is made between an owner of land and another person which is not a lease - that is, it does not grant exclusive possession for a definite period of time – the legal relationship is that of a licence. Licences are ubiquitous in our society. For example, if you were able to go and see the Blue Jays play baseball you purchase a licence (ticket) allowing you to be in the stadium. Licences are invariably contractual – see the back of your ticket for the terms of the contract.

It is often easy to know whether you have a lease of a licence. But not always.

THE LEASE-LICENCE DISTINCTION

It is one thing to say that a lease is the grant of a leasehold estate, but knowing that will not tell you whether a particular agreement constitutes a lease or some other arrangement between the parties over use of land. The most common "other" legal form to an alleged lease is a licence, which is simply permission to use land for some purpose. If you let somebody park in your driveway, for example, you have granted them only a licence. Knowing which of the two has been created in any agreement is often vital, for at common law a licence is revocable at any time by the licensor. [Equity will enforce a contractual licence, one in which consideration has been paid, but even then it is effectively revocable provided damages are paid.]

An obvious example of an agreement that could be a lease or a licence, and of the importance that flows from deciding which is involved, comes from thinking of a superintendent in an apartment building. He or she works for the owner and usually lives in one of the apartments. If the agreement to occupy the apartment was construed as being only a licence, as but one term of many in the contract of employment and given in order to make it easier to carry out the terms of employment, the superintendent would have no legal protection outside any terms contained in the licence, the contract. If the same agreement to occupy was seen as a lease, and therefore completely independent of the employment relationship, the superintendent could claim whatever protection the jurisdiction's legal regime chose to give to tenants, whether or not he or she continued to work for the owner. As it happens, this situation is largely covered by a provision of the Residential Tenancies Act in Ontario, but the example should help to point up the significance of the lease/licence distinction.

However, stating which consequences flow from whether an agreement for the occupation of land is a lease or a licence is easier than deciding whether that agreement is a lease or a licence. Indeed, this can be quite a difficult question. If an agreement is uncertain as to duration, it will be a licence. But certainty of duration is only a necessary, not a sufficient condition, for a lease. Beyond that, the cases reveal two approaches to deciding whether a particular agreement is a lease. One line of cases states that if the agreement grants, or intends to grant, exclusive possession for a fixed time it is a lease. That is, the only thing that matters is whether the right to exclusive possession has been granted. If it has, the agreement is a lease and grants an estate, whether or not it uses the word licence 100 times. Another, more recent, line of cases suggests that it is the intention of the parties that matters; if they intend to be landlord and tenant, then the court will give effect to that intention. Thus a document that looks like a licence can be held to be a lease because of its language, so that exclusive possession is granted to the lessee irrespective of what the document says. Conversely, by this approach a document that grants exclusive possession for a term can be held to be a licence because the parties call it a licence.

The *MetroMatic* case below illustrates this latter approach, which is the one preminently used by the courts. Note that the 'lease' contains a variety of clauses relating to matters beyond the simple question of the right to occupy the land. These terms are called covenants in a lease, the equivalent of 'contractual terms' in other kinds of agreements. Such covenants seem to limit the tenant's rights of exclusive possession, and one might be tempted to say that any such limit means that exclusive possession has not been granted. Alternatively and conversely (or perhaps perversely) one might say

THE INDEPENDENCE OF COVENANTS

The next three sections expand on the point that a lease confers an estate in land, not merely certain contractual rights and obligations, by examining the doctrine of the independence of covenants, and the legal consequences that flow from physical abandonment of the demised premises by the tenant.

One of the incidents of the landlord-tenant relationship being a property relationship is the doctrine known as "the independence of covenants". Covenants are terms in the lease in addition to the grant of the estate itself by which either or (usually) both parties agree to undertake certain duties - the landlord might provide heat, for example, while the tenant would agree to pay rent. To say that covenants are "independent" at common law means that failure by either party to perform an obligation does not give a right to the other to terminate the lease. That is, performance of an ancillary obligation is independent of the duty to perform corresponding ones and/or the principal one. As McDonald C.J.B.C. put it in *Falleson* v. *Spruce Creek Mining Co*, [1942] 4 D.L.R. 708 (B.C.C.A.): "a lessor cannot re-enter for mere breach of covenant".

However, he also noted that if re-entry for that particular breach was made "an express term in the lease", the lessor could do so. That is, if the lease was made conditional on the performance of that particular ancillary obligation then breach of the obligation would enable the landlord to end it. This is not an exception to the independence of covenants, but an application of the notion that estates may be conditional.

Laskin, *Cases and Notes on Land Law*, puts it this way: "Where a bargain is made for the lease of premises ... on terms embodied in a formal document of lease, the lessee (at least on entry) acquires an estate which he holds subject to those terms. The pertinent question is to what extent is the transaction regarded as the transfer of an interest in land (and hence governed by rules and doctrines developed as part of the law of estates) and to what extent is it regarded as a business dealing (and hence governed by rules and doctrines developed later as part of the law of contracts).... Where the relationship was still that of lessor and lessee (before entry into possession) the common law tended to emphasize the contractual aspect of the bargain.... Once, however, tenure was established, whether in pursuance of a formal lease or of an agreement for a lease, property conceptions dominated. ... Thus, the tenant was not entitled to be excused from further performance or to terminate his lease unless there was a breach of condition by the landlord rather than a mere breach of covenant."

In recent years there has been some undermining of this notion, a matter to which we will now turn.

FROM PROPERTY TO CONTRACT? ABANDONMENT AND SURRENDER

There are a variety of ways by which a leasehold relationship can be ended, other than simply by the term of years expiring. The most important is known as "surrender". Using an old definition, this is "the yielding or delivering up of lands or tenements and the estate a man has therein, unto another that has a higher and greater estate". "Surrender" cannot be unilateral, it is not brought about merely by the tenant quitting the premises, an action we should call "abandonment". If the tenant obtains the landlord's agreement (express or implied) to his or her leaving, such agreement converts mere abandonment into surrender of the estate to the higher estate holder, the landlord.

What if the tenant wants to surrender half way through a one-year lease and the landlord does not? Putting aside any issues relating to specific performance, apply to this problem what you have learned in contract law. You would tell the tenant that he or she is probably best to just get out and hope that the landlord, who has a duty to mitigate damages, will find somebody else to rent the premises at the same or a reduced rent. Your client would be liable for damages for breach, but they might not be that heavy, being only the difference between what you would have paid and what the landlord can get somebody else to pay. Conversely, you would probably advise the landlord that he or she cannot make the tenant stay, that the best thing to do is to secure the premises and try to find another tenant knowing that you can sue the defaulting tenant for any shortfall.

But, as we have seen, a lease is not a contract, it is an estate. And according to classical principles that means that if it is granted for twelve months it lasts for twelve months, unless surrendered, in which case it is absolutely at an end with no future obligations on either side. So, according to this classical property law analysis of the problem, as laid out in *Goldhar* below, you would have to tell the tenant something different. You would have to say that whether or not he or she physically abandons the premises the lease subsists for 12 months and he or she is liable for rent for the whole term. The landlord has no duty to mitigate damages. But hopefully the landlord will do something foolish like re-enter and change the locks, in which case he or she will be considered to have accepted that a surrender has taken place and your client will have no liability left at all. So it's all or nothing for the tenant. Conversely, if advising the other side, you would caution the landlord that finding another tenant would be interpreted as a surrender and no rent could be got from the defaulting tenant. If the landlord wanted to get such rent, he or she would have to leave the premises unoccupied. Moreover, the landlord cannot sue for the whole of the term's rent when the tenant decamps after 6 months but must wait until it becomes due and is not paid (assume it's due monthly).

All of this is explained in *Goldhar*. Both that case and *Highway Properties*, which follows it, also show that there are some wrinkles in the traditional position and that factual considerations relating to such matters as whether, and if so when, the landlord accepted the abandonment and therefore brought about a surrender can be very important. As you read *Goldhar*, think about why the traditional position reinforces the principal lesson of this chapter - that the lease is a property relationship. You will also see that *Highway Properties* alters the traditional law: given the result in that case, how would you answer the question contained in the first clause of the heading to this section?

IMPLIED OBLIGATIONS ON THE LANDLORD: THE COVENANT FOR QUIET ENJOYMENT AND THE COVENANT NOT TO DEROGATE FROM GRANT

These are far and away the most important obligations imposed by the common law on landlords. The covenant for quiet enjoyment supports the tenant's right to possess the whole of the land granted without an interference, traditionally only a physical interference, by the landlord or persons acting under the landlord. In essence the covenant has the landlord saying: "I grant you exclusive possession, and I will not interfere with that possession". It has been called a "title warranty".

It is more fully defined in *Kenny* v. *Preen*, [1962] 3 A11 E.R. 815 (C.A.): "The implied covenant for quiet enjoyment is not an absolute covenant protecting a tenant against eviction or interference by anybody, but is a qualified covenant protecting the tenant against interference with the tenant's quiet and peaceful possession and enjoyment of the premises by the landlord or persons claiming through or under the landlord. The basis of it is that the landlord, by letting the premises, confers on the tenant the right of possession during the term and impliedly promises not to interfere with the tenant's exercise and use of the right of possession during the term. I think the word "enjoy" used in this connexion is a translation of the Latin word "fruor" and refers to the exercise and use of the right and having the full benefit of it, rather than to deriving pleasure from it."

The covenant not to derogate from grant is an instantiation of a general principle in real property law that the grantor not derogate from the grant. It underlies, for example, the basic implied grant rule in the creation of easements. It is often put this way: a grantor may not give with one hand and take away with the other. In landlord-tenant law, a derogation from grant is said to occur when some act of the lessor, or those acting on his or her behalf, renders the land substantially less fit for the purpose for which it was let.

Like all covenants, the covenant for quiet enjoyment and the covenant not to derogate from grant are independent, and a breach of one or the other gives rise to an action for damages. However, in practice tenants have often been able to argue that a breach of the covenant not to derogate from grant represents a constructive eviction and thus bring the leasehold relationship to an end.

There are many points of overlap between the two covenants. For example, if a landlord granted land to a tenant, reserving the right to extract sub-surface minerals, and the landlord's mining operations caused a subsidence, then the landlord would both be interfering with the tenant's normal enjoyment of possession and essentially derogating from grant, making the land unfit for its purpose.

There are nonetheless some differences. Traditionally an interference with the covenant for quiet enjoyment had to be what the law considered to be a 'physical' interference, whereas a derogation from grant could be physical but did not have to be. Physical interference includes a physical invasion by the landlord personally, or the blocking of access, as in *Owen* v. *Gadd* below. In fact this distinction has been eroded in recent decades. Some cases have said there is no need for a 'physical' interference to trigger quiet enjoyment, others have expanded the meaning of 'physical.'

An example of the former is denying one or more of the incidents of exclusive possession. In

Cunningham v. *Whitby Christian Non-Profit Housing Corp* (1997), 9 R.P.R. (3d) 210 (Ont. G.D.) the tenant occupied assisted housing. She dated another tenant, who was a "problem" tenant and who eventually moved out. But he still saw her, and on occasion stayed overnight. The tenant's lease contained a clause restricting occupancy of her apartment to her and her young son. The landlord wrote to her to say that while she could have an occasional overnight guest, they were concerned that the boyfriend was more than that. Later it sent the boyfriend a notice prohibiting him entry to the complex and threatened him with trespass proceedings if he did so. The court found that the letters warning about occupancy were not a breach of the covenant, but an attempt to prevent a tenant inviting a particular person to her apartment was a breach. The landlord could bar a person who was not a tenant, but could not do so if that person was an invitee of a tenant.

Another example of doing away with the need for physical interference, and of expanding its meaning, is *Kenny* v. *Preen*, cited above. The landlord made threats of physical eviction, statements that he would remove the tenant's belongings, and engaged in a campaign of harassment - banging on her door, shouting etc - designed to get her to leave. The court stated: "I would decide on two grounds in favour of the tenant's contention that there was, in this case, a breach of the covenant for quiet enjoyment. First, there was a deliberate and persistent attempt by the landlord to drive the tenant out of her possession of the premises by persecution and intimidation, and intimidation included threats of physical eviction of the tenant and removal of her belongings. In my view that course of conduct by the landlord seriously interfered with the tenant's proper freedom of action in exercising her right of possession, tended to deprive her of the full benefit of it, and was an invasion of her rights as tenant to remain in possession undisturbed, and so would in itself constitute a breach of covenant, even if there were no direct physical interference with the tenant's possession and enjoyment. ... Secondly, if direct physical interference is a necessary element in the breach of covenant that element can be found in this case to a substantial extent."

A variety of other cases show the expansion of the covenant in recent decades. In *McCall* v. *Abelesz*, [1976] 1 All E.R. 727 (C.A.) the landlord refused to pay utility bills, and as a result the gas, water and electricity were cut off. Denning L.J. stated that the covenant for quiet enjoyment "is not confined to direct physical interference from the landlord", and that "it extends to any conduct of the landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as tenant". Authority for this was given as *Kenny* v. *Preen*.

The most obvious way in which the covenant has been expanded in recent decades has been the inclusion of interference with comfort and privacy as causes for breach. These matters are now covered for residential tenancies in residential tenancies legislation.

If it is the case that there is no longer any need for a physical interference to make out an argument that the covenant for quiet enjoyment has been breached, then the major difference between the two covenants is in the extent of the interference. Two leading English cases follow. *Owen* v. *Gadd* is clearly a case of limited interference - the tenant's enjoyment was impaired but it could not be said that the tenant could not use the premises at all. *Harmer*, conversely, involved an interference which was 'total' in the circumstances:

THE TENANT'S OBLIGATION TO PAY RENT AND LANDLORDS' REMEDIES

The rights and obligations of landlords and tenants are of three types: those implied by the common law, those that can be negotiated between the parties (express covenants, terms inserted into a lease), and those imposed by statute. This section deals with the second and third of these, both of which play a role in the law relating to the tenant's obligation to pay rent and the landlord's remedies when the tenant fails to do so.

The law in this area is a mixture of common law and statutes, I need to explain their relationship. Landlord and tenant law has its origins in the early common law, and thus most of its core principles have long been common law, not statutory, and remain so. Most Canadian jurisdictions passed *Landlord and Tenant Acts* in the nineteenth century. These acts did not reform any central elements of the law, they merely put a gloss on existing doctrines or made procedural innovations.

The common law never made any distinction between tenancies based on the function of the lease - agricultural leases, commercial leases and residential leases were all treated the same. Most provinces enacted reforms in the 1970s which did draw a distinction between commercial and residential leases. In Ontario, for example, a Part IV was added to the *Landlord and Tenant Act* in the early 1970s, which dealt only with residential tenancies and changed many of the common law rules. From the 1970s we can therefore talk about two different legal regimes for tenancies, commercial and residential.

Since the late 1980s there have been a variety of name changes, and some substantive changes, to the Ontario legislation. In 1998 the government brought in the *Tenant Protection Act,* S.O. 1997, c. 24. This repealed all of Part IV of the *Landlord and Tenant Act* and was applicable to residential tenancies. The *Tenant Protection Act* also renamed Parts 1-3 of the *Landlord and Tenant Act*, calling them the *Commercial Tenancies Act*, although no provisions were changed. From 2007 the *Residential Tenancies Act*, S.O. 2006, c. 17 has supplanted the *Tenant Protection Act.*

To summarise: (1) The law relating to commercial tenancies remains largely the common law, supplemented by what is now called the *Commercial Tenancies Act*, which is essentially the old *Landlord and Tenant Act* under a different name. Many of the cases excerpted in the next few sections refer to the *Landlord and Tenant Act*, but the provisions referred to are identical to those in the current *Commercial Tenancies Act.*

(2) Conversely, the law relating to residential tenancies, which we will examine in the next chapter, is fundamentally different and entirely statutory. In the cases used there three different statutes are mentioned - the *Landlord and Tenant Act, Part IV,* the *Tenant Protection Act*, and the *Residential Tenancies Act.*

Now we can return to rent. Rent is not a requirement of the leasehold relationship, and therefore there was no implied obligation to pay it at common law. But if it is included in the lease, and of course that is invariably the case, then the common law imposed an obligation to pay. If rent is included in a lease the obligation to pay it is now a statutory condition: see *Commercial Tenancies*

Act, s. 18 (1).

Section 18 (1), *Commercial Tenancies Act*: "Every demise, whether by parol or in writing and whenever made, unless it is otherwise agreed, shall be deemed to include an agreement that if the rent reserved, or any part thereof, remains unpaid for fifteen days after any of the days on which it ought to have been paid, although no formal demand thereof has been made, it is lawful for the landlord at any time thereafter to reenter into and upon the demised premises or any part thereof in the name of the whole and to have again, repossess and enjoy the same as of the landlord's former estate."

Note that s. 18(1) says "unless it is otherwise agreed." Many commercial leases do indeed include a provision shortening the 15-day grace period. Such provisions also typically require the landlord to give notice of the default and of its intention to terminate as a result.

Note also that physical re-entry is a "self-help" remedy, and self-help remedies are not usually available to creditors. If I owe you money and refuse to pay you are expected to go to court for an order to pay. It is not acceptable to take the law into your own hands by walking into my office, picking up my wallet lying on the desk, and help yourself to some banknotes.

At common law the right to forfeit could be exercised as soon as the tenant failed to pay rent, but under the statute the tenant has 15 days to pay. Thus the *Commercial Tenancies Act*, s. 18, both makes the payment of rent a statutory condition, not an independent covenant, and gives the tenant 15 days before the condition becomes operative.

If the tenant fails to pay rent the landlord has a number of options. First, he or she can choose to end the lease - forfeit the lease. This may be done either by a physical re-entry by the landlord, or through an action in court for possession. In either case the landlord may also, and obviously usually would, sue for rent due. The second option is that the landlord has another 'self-help' remedy – enter the rented premises and take some of the tenant's property. This is called distress.

Distress is a remedy unique among all "creditors". The landlord can seize the tenant's goods which are on the demised premises and sell them to meet the rent due. However, distress is a remedy which flows only from the existence of the landlord-tenant relationship, and therefore it requires that relationship to continue. That is, the landlord generally cannot both forfeit the lease and take distress. The only exception to this principle comes in s. 41 of the *Commercial Tenancies Act*, reproduced below

Distress is an ancient remedy, and an unusual one. Ziff calls it a "powerful remedy" and a "relic of feudalism": *Principles of Property Law*, 4th edition, p. 283. It is based on the idea that rent "issues out of the land", and therefore one can take the "produce" of land in lieu of rent. Indeed in the medieval period the "rent" was often the produce anyway. When landlord and tenant relationships stopped being overwhelmingly concentrated in the agricultural sector distress was firmly entrenched in the common law, and the things that could be taken and sold grew to include consumer and household goods as well as agricultural produce, even though it is hard to say that TV sets in an electronics store really "issue out of the land."

CHAPTER 11 - RESIDENTIAL TENANCIES

INTRODUCTION

As noted in Chapter 10, since c. 1970 all Canadian jurisdictions have enacted separate statutory regimes for residential, as opposed to commercial, tenancies. These regimes vary from province to province. That of Ontario is now to be found in the *Residential Tenancies Act*, S.O. 2006, c. 17, portions of which are reproduced at the end of this chapter.

Residential tenancies statutes deal principally with the *legal* rights and obligations of landlords and tenants. But they, or in some cases separate legislation, deal also with the economics of the relationship and with procedural matters. Re the former, Ontario and many, but not all, other provinces have long had some form of rent control, more properly called rent review because most schemes provide for a gradual increase in rent over time. Ontario has had two forms of rent review. Before the passage of the *Tenant Protection Act* in the 1990s the rent was attached to the apartment. Rent review was maintained in the *Tenant Protection Act*, but for sitting tenants only. New tenants were no longer protected. In other words, the system was changed from one in which the rent for the premises was controlled, to one in which the rent for a tenant is controlled so long as he or she resides in the premises. This system is sometimes known as "vacancy decontrol" - on a vacancy the rent is 'decontrolled'. This system is in place today. As s. 113 of the *Residential Tenancies Act* states: "the lawful rent for the first rental period for a new tenant under a new tenancy agreement is the rent first charged to the tenant."

Rent controls are seen by most people as necessary to support the legal rights given to tenants. That is, if a landlord were free to set whatever rent he or she wanted, a tenant that the landlord did not want could be "economically evicted" by raising the rent to the point that the tenant would be

forced to leave. This would undermine the primary objective of residential tenancies legislation, discussed below, of giving tenants a measure of security in their homes.

Another significant aspect of the current regime, in Ontario and most other provinces, has been the creation of agencies other than the courts for adjudicating residential tenancy disputes. The relevant body in Ontario used to be called the Ontario Rental Housing Tribunal. It is now called the Landlord and Tenant Board. It is one of eight tribunals that a few years ago were organized under one agency, Social Justice Tribunals Ontario. Decisions of the Board can be reviewed (reconsidered on questions of law) in the Divisional Court.

The Board has exclusive jurisdiction over disputes between landlords and tenants, but jurisdiction in no other matters. Its members, sometimes called exactly that and sometimes called adjudicators, sit singly in a large number of offices around the province. They can be, and often are, lawyers, but they are not required to be. Until recently the notion that the Board only deals with disputes between landlords and tenants was applied very literally, so that the Board had no jurisdiction over disputes between parties who were no longer landlord and tenant. Claims for unpaid rent after a tenant had been evicted, or tenants claims against landlords for various matters, had to be taken to small claims court. The Board now has jurisdiction to decide these issues: *Protecting Tenants and Strengthening Community Housing Act*, SO 2020, c. 16.

Residential tenancies law can obviously be set against the general background of some of the themes of this course - particularly the ideas that property is a bundle of rights and that the content of property regimes and the arguments supporting one or the other are matters of social choice and change over time. The legal reforms first introduced in the 1970s have remained largely unaltered since then. However there have been changes to the rent control scheme, as noted above.

The general thrust of the various legislative changes begun in the 1970s has been to make the conceptual basis of residential tenancies law different from that of commercial tenancies in two fundamental ways.

First, while the commercial lease is still an estate, the residential lease is a contract for accommodation. The *Residential Tenancies Act* as a whole is underpinned by this idea, but we can also point to particular sections as shifting the conceptual basis from estate to contract law. Some sections introduce contractual doctrines (s. 16 mitigation; s. 17 interdependence of covenants; and s. 19 frustration). The interdependence of covenants section has less significance than it might seem to have, because the termination sections, discussed below, provide a complete code for when a tenancy can be terminated by the landlord. But it does operate to permit the tenant to withhold rent where a landlord is in serious breach of its obligations. Tenants have been able to take advantage of it, for example, where the unit was full of cockroaches or where the hydro was cut off because the landlord did not pay the bill.

Other "contractualisation" provisions include section 40, which abolishes distress. In addition, section 3, the application section, refers to "rental units in residential complexes", not to leases or demised premises or the like, and "rental unit" is defined as including "a room in a boarding house, rooming house or lodging house and a unit in a care home."

Second, while the terms of the commercial lease are largely a matter for the parties to negotiate, a residential contract for accommodation is in significant ways a regulated contract; the power of the parties to make their own terms is substantially curtailed. This second point is somewhat less true of the current Ontario legislation than it was of the pre-1997 regime, in that the rent control regime has been changed. But it remains the case that the legislation in many other areas takes away the ability of the parties to bargain and substitutes imposed terms. One example of this second theme is the repair and fitness for use provision (s. 20). This changes the common law, which put the repair obligation on the tenant unless the parties bargained otherwise. It requires the landlord to both *provide* and *maintain* premises in good condition.

Underpinning this second theme is the idea that there is an inequality of bargaining power between residential landlords and tenants. The market, and thus the common law which both derives from laissez-faire and advances it, was considered an inappropriate form of ordering, because truly free bargaining did not take place. The consequences of this idea about the inequality of bargaining power include the prohibition of "contracting out" (s. 3), the elimination of landlords' "self-help" remedies (ss. 21, 25 , 39 and 40), the prohibition of "no-pet" clauses (s. 14) and statutory security of tenure (see ss. 37 *et seq*, and this chapter).

Note also that in various ways the Act seeks to ensure that tenants understand their rights. On occasion this is done by attempts to use plainer language than is used for common law concepts (see the mitigation section, s. 16, for example, as well as s. 40, which does not refer to distress while abolishing it.) At other times it is done by imposing requirements on the landlord to provide the tenant with information about his or her rights. See in particular sections 11 and 12. Obviously this reflects the fact that residential tenancy law is an area that often affects the poorest members of society.

The various acts specifically about residential tenancies are not the only statutes that govern the area. Other statutes directly relevant include the *Human Rights Code* which prohibits discrimination in the provision of accommodation. The *Code* has also in recent years affected the operation of some of the termination (eviction) provisions, as discussed below.

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SECURITY OF TENURE AND MINIMUM STANDARDS: LAW AND POLICY

The major change in residential tenancies law in Ontario has been the introduction of security of tenure. The statutory sections are 37 – 39; section 38 is the key section. They are not as clear as they could be, but what they say is that in Ontario the tenant has substantial, though by no means complete, security of tenure. The tenant is not obliged to leave merely because the tenancy agreement expires; rather, the agreement is deemed to continue on a month to month basis. The right of the tenant to occupy is thus separated from the tenancy agreement (note that the word lease is not used, it's called a tenancy agreement, part of the move away from estate to contractual ideas and language.)

The tenant's security is not absolute. He or she may be obliged to leave for certain reasons, dealt with in the sections below entitled "Termination of Tenancies: Landlords' Rights" and "Termination of Tenancies: Tenant Fault".

There is some security of tenure greater than that given by the common law in most Canadian jurisdictions, though its extent varies.

Security of tenure, and the other legislative reforms of the 1970s in Ontario, represent a substantial shift of strands in the bundle of rights from landlord to tenant. This was effected because of a societal consensus that an apartment was a home even if its occupier did not own it, and that the law ought to provide protections to the home above and beyond what the market and the common law could provide.

At the same time that security of tenure was introduced, a similar consensus formed around the idea that there ought to be minimum basic standards in housing; hence the fitness for use and repair provisions, for example, which can be seen as a form of consumer protection legislation.

The extract which follows, from S. Makuch and A. Weinrib, *Security of Tenure* (Research Study No. 11, Ontario Commission of Inquiry into Residential Tenancies, 1985), expands on this idea that an apartment is a home, on its origins and consequences. This report was written over 40 years ago, but the arguments it makes are probably still largely the societal consensus. "It was in 1970 that Ontario legislation, with amendments to the *Landlord and Tenant Act*, first dealt specially with residential tenancies.... The main effect of the 1970 amendments to the *Landlord and Tenant Act* was to bring about a revolution in residential landlord and tenant law .... There was a change from a property relationship on the part of the tenant to one closer to a contract between the landlord and tenant, but with the added benefit to tenants that the provisions of the Act could not be waived. The amendments not only introduced contract principles into residential tenancy relationships, but imposed a duty on the landlord to repair and maintain all rented premises; abolished security deposits for damages while permitting a deposit for the last month's rent; required the delivery of a copy of the tenancy agreement; abolished seizure of a tenant's goods; prohibited landlords or tenants from changing locks during occupancy without mutual consent; granted some protection from retaliatory eviction; and provided that a landlord could regain possession and evict only under court orders. These amendments did not in themselves create security of tenure, but they supplied the framework for it and helped create a rationale for it. It can be argued that by moving the landlord and tenant relationship from its feudal origins and its preoccupation with proprietary interest to a modern basis in contract law, the legislation set the basis for a new security of tenure regime.... In modern contract law, it has been argued, liability is based on principles of reasonable reliance and reasonable expectations.... The importance of reliance and reasonable expectations is pervasive in law.... The reasonable expectations of most people in society were not being met in the laws dealing with the landlord and tenant relationships under a feudal regime. The law did not come close to meeting the social view of fairness and what residential tenants should reasonably be able to rely on and expect in their relationships with their landlords... [S]ecurity of tenure may be implemented for different purposes. It ... may be viewed as a measure designed to protect the psychological interest of the tenant and thus one that is meant ... to ensure that the tenant has

security of tenure similar to that of a purchaser of a home.... There is a great deal of literature that suggests that modern social values have moved increasingly towards an acceptance of security of employment, housing, and government largesse as family ties have become more attenuated.... Such a view supports the notion that freedom of contract is no longer the norm and that society can and should impose social values in landlord and tenant relationships as it does in consumer affairs and other contractual ... relationships based on reasonable reliance and expectation.... Many tenants become attached to their home, even if it is rented from someone else and do not want to move into economically equivalent housing even if it is provided."

Similar arguments are made in G. Yee, "Rationales for Tenant Protection and Security of Tenure", (1989) 5 *Journal of Law and Social Policy* 37. This article was written by an economist and is mainly concerned with arguing that the rental housing market is inefficient, and that the market cannot be relied on to advance societal needs in this area. This extract does not reproduce the economic analysis, but Yee's arguments for what he calls the need for a degree of "specific egalitarianism" in housing are.

"Our society does not appear to favour general egalitarianism. Or at least, as a matter of political reality ... this philosophy will not be put into practice. Accidents of endowment or birth still play a large role in determining one's wealth or position in life. However, it has been noted that many people accept some kind of specific egalitarianism. That is, certain scarce but basic commodities should be distributed more equally than the distribution of the ability to pay for them. Housing is arguably one of them commodities. The view that housing is a basic commodity which should be distributed more equally does not necessarily mean everyone is entitled to live in equally attractive accommodations. It may mean only that everyone is entitled to a certain minimum quality of housing. This approach is more in line with the philosophy that inequality is acceptable so long as no one is living in poverty. The problem is defining the fundamental needs which society should ensure are met and also the level to which they should be met. With respect to shelter, if one accepts that everyone is entitled to a certain minimum standard of habitability and a certain minimum level of rights which includes security of tenure, then government action would be justified to give effect to such fundamental needs. One does not have to favour general egalitarianism or even specific egalitarianism (for housing) in order to justify a certain minimum level of protection for tenants. The main ethical argument would be over the extent of the protection, not over whether there should be any or not.

Shelter may be seen as a fundamental need which society should assist people to obtain or even ensure that they do. To go one step further, the fundamental need may be defined as reasonably adequate accommodation. This would mean looking at the quality of housing. Two major aspects of quality for rental housing are habitability (physical features, condition of repair, etc.) and security of tenure.... Security of tenure is definitely a vital or legitimate interest. If unregulated market forces do not lead to any meaningful kind of security of tenure for tenants ... then the government may be justified in taking action. This may depend on the other legitimate interests which may be affected, such as the landlord's private property rights.

Another ethical rationale for action is the general vague belief that the government should protect

TERMINATION OF TENANCIES: TENANT FAULTS

There are a number of causes for eviction which involve fault on the tenant's behalf. Although I have distinguished these from those above, based on landlords' rights, the causes discussed in this section also involve landlords' rights. That is, it is not so much the fact that a tenant has done something "wrong," but that the tenant fault affects the landlord's economic interest or the integrity of the reversion. Tenant faults can affect the former directly (for example non-payment of rent) or indirectly (for example interference with the reasonable enjoyment of other tenants). Tenant faults can also affect the reversion in a physical sense (see the undue damage provision) or reputationally (such as through commission of an illegal act).

With one exception eviction for the causes discussed in this section can happen before the end of the term of the tenancy, unlike the causes discussed in the previous section. Notice periods for some causes, especially for illegal acts and impairing the safety of others, are quite short.

I will discuss (most of) these causes in the order in which they appear in the *Act*. There is not time nor space to discuss them in any great detail, especially as the only way to get a sense of how they are applied is to read a great many short administrative tribunal decisions which turn on the facts. Although some cases go to the Divisional Court there are very few reported cases.

Persistent Late Payment of Rent. Section 58 (1) 1 - persistent late payment of rent - can lead to eviction at the end of the term, the only "tenant fault" cause that does so. It can be invoked even if the tenant does not transgress s. 59, the *non*-payment section discussed below. However, it does take a long and consistent pattern of lateness. In *Senkow et al* v. *Manufacturers Life Property Corporation* (1990), 13 R.P.R. (2d) 243 (Ont. Div. Ct.), for example, the tenants were late with 25 of 29 rental payments, and this kind of consistent tardiness is usually what is required to invoke this cause for termination. As we will shortly see with reference to section 59, generally the *Act* takes the view that it does not matter if the landlord gets rent late, only that it is received sometime. Hence the tenant's interest in the home generally takes precedence over the landlord's convenience, given that ultimately the landlord will have its economic interest protected by payment, albeit late payment. But s. 58 also clearly stands for the proposition that at some point the inconvenience to the landlord does override security of tenure.

Non-payment of Rent. Not surprisingly non-payment of rent is the most common cause for termination. Section 59 (1), gives the landlord the right to terminate the tenancy with 14 days notice. Note that section 59 (2), states that if the tenant pays before the notice period expires the notice to terminate is automatically void. Hence, in effect, the tenant has 14 days to pay. Similarly to commercial tenancies, the idea here is that the tenant's investment in the premises, in this case a home, overrides the landlord's interest in getting the rent on time. Since the landlord's interest in rent is an economic one, it is secondary to the tenant's security, so long as payment is ultimately forthcoming.

There are many other ways for the tenant to avoid termination even after the 14-day period has expired. One is in s. 59 (3), which voids the notice if the tenant pays before the landlord applies to the Board for an order terminating the tenancy. Per s. 74 (1), a landlord cannot make that

application "before the day following the termination date specified in the notice."

Section 74 (2), provides another point along the path to eviction for the tenant to avoid eviction - paying before the Board issues an eviction order, that is, between when the landlord applies to the Board and when the hearing is held. At this stage the tenant must also pay the landlord's application fee.

A further chance to make good is in s. 74 (3) and (4), which voids an eviction order if rent owed (and now costs as well) is paid before the eviction notice becomes effective.

The purpose of these provisions is obviously to give the tenant as much time as possible to pay and avoid eviction. Even if a tenant is unable to pay at any of these stages, he or she may still apply for relief from eviction, a matter discussed in a later section.

Illegality. Section 61 is the illegality section. It contains an important change from both of the previous Acts. It states that a tenant can be evicted if either the tenant *or another occupant* of the rental unit commits an illegal act. Prior to 2006 it was only possible to evict a tenant for the actions of another occupant if one could also establish that the tenant had permitted the illegal act. Under the current legislation the landlord need only show that the tenant "permitted" the illegal act if it was actually done by some third party, not an occupant. Some occupant cases involve room-mates, but most involve adult children.

Note that, per s. 75, it is not necessary for the tenant or occupant to have been convicted criminally of an illegal act to invoke this section. Indeed they need not even have been charged, although as a practical matter a charge is a good source of evidence for the landlord. In *Toronto Community Housing Corp* v. *Norton* [2006] O.J. No. 2711 (Div. Ct.) an illegal act was found to have been committed even though the criminal charge was withdrawn. In addition, the landlord need not prove the illegality on the beyond a reasonable doubt standard. This is a general common law rule - where a finding of criminal activity is needed to trigger a civil consequence, only the civil standard is required on the threshold question of the criminal act. It has not always been the case. Until 2008 courts applied a variety of standards in between reasonable doubt and balance of probabilities where criminal conduct was an issue in a civil proceeding. This included eviction for illegal act cases: see in particular *Bogey Construction Ltd* v. *Boileau* [2002] O.J. No 1575 (Div. Ct.). However, the Supreme Court overruled all such decisions in *F.H.* v. *MacDougall,* [2008] S.C.J. No. 54. It stated: "I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof." This is not to say that the legislature cannot choose to impose a higher standard. The Ontario *Police Services Act*, for example, requires misconduct to be proved against a police officer on "clear and convincing evidence."

The courts have put an additional gloss on the meaning of "illegal act" in this section. The act need not be a *Criminal Code* offence, it can be any contravention of a statute, including the *Residential Tenancies Act*. However, the offence must be a serious rather than a trivial or technical one, and,

most importantly, it must have the potential to affect the character of the premises or disturb the reasonable enjoyment of the premises by the landlord or other tenants: see *Samuel Property Management Ltd.* v. *Nicholson* [2002] O.J. No 3571 (C.A.), confirming a number of prior decisions of the Divisional Court. This illustrates a point made at the beginning of this section - a tenant is not to be evicted because he or she does something wrong, but only if the transgression has some relevance to the landlord, either harming the landlord's reputation or his or her economic interests.

Many of the cases on what is now s. 61 involve drugs, and in those cases the courts usually terminate tenancies as a result, especially if trafficking is involved. Indeed note the different notice periods for production/trafficking in drugs offences than for all other offences.

Because illegal acts are considered more serious than non-payment of rent or causing damage or interfering with the enjoyment of other tenants (below), there is no "make good" provision as there is for sections 59, 62 and 64. Moreover, per s. 71, a landlord can apply to the Board for eviction immediately on issuance of the notice to the tenant; he or she need not wait until after the notice period expires, as is the case with s. 59.

Undue Damage. Section 62 is straightforward - a tenant can be evicted if the tenant, or another occupant of the rental unit, or a person whom the tenant permits to be in the unit, causes undue damage. Note that as with non-payment of rent there is a "make good" provision which voids the application if it is complied with. A landlord cannot apply to the Board for an eviction order during the 7-day remedy period, but may do so immediately afterwards: see ss. 70 and 71.

Interference with Reasonable Enjoyment of Other Tenants or the Landlord. Section 64 allows eviction for "substantial" interference with the reasonable enjoyment of the premises by other tenants or by the landlord. As with s. 62, there is a requirement that the notice of termination specify the problem and give the tenant seven days to "make good", in which the case the notice becomes void. As with the undue damage cause, a landlord cannot apply to the Board for an eviction order during the 7-day remedy period, but may do so immediately afterwards: see ss. 70 and 71.

Section 64, and section 66 below, must be read in conjunction with s. 76, which, given the prohibition on "no-pet" clauses, defines what role an animal can play in a termination application.

It is difficult to be precise about what kinds of conduct represent a sufficient interference to invoke the section. Aggressive and /or noisy behaviour is often the problem, and there are many cases in which the finding has been that one has to put up with a certain amount of noise and disturbance in an apartment building, especially one containing lots of children. Indeed in one instance a tenant's over-sensitivity to noise, which resulted in frequent complaints, was held to be itself behaviour which interfered with other tenants! Other causes for complaint have included a failure to clean and smoking.

Section 64 really deals with problems between tenants, and that observation leads to two other ones. Firstly, it actually gives tenants a remedy against their tenant neighbours that non-tenants do not have against their neighbours. Non-tenants must use whatever other legal resources, if any, are open to them. The point is made by *Laing* v. *Brushette* [1996] O.J. No. 2732 (Gen. Div), in which the landlord, the owner of a condominium unit, sought to evict a tenant who disturbed the other residents of the building. But those other residents were owner-occupiers, not tenants, and the section, which refers to tenants and not neighbours, was not available to the landlord as a result.

Second, and also using the *Laing* example to make the general point about tenant fault made at the beginning of this section, s. 64 does not give a landlord the right to evict because a tenant behaves badly. It only gives him or her the right to do so only if that behaviour affects other tenants and by doing so affects the landlord's economic interests.

In recent years the *Human Rights Code*, particularly the prohibition of discrimination against those with mental disabilities, has had an impact on the use of s. 64, although usually in the context of whether relief from eviction should be granted: see the *Walmer Developments* case below.

Obviously the same kinds of problems that can invoke the operation of s. 64 can occur in other "neighbour" contexts, with the closest example being condominium buildings. The equivalent to eviction in such buildings is a forced sale, and this was ordered in one very unusual case, *The Owners Strata Plan LMS 2768* v. *Jordison and Jordison*, 2013 BCCA 484. The condominium by-laws included a provision that "A resident or visitor must not use a strata lot, the common property or common assets in a way that, ... (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot." For years other residents complained of the Jordisons' "obscene language and gestures, ... interference with the activities of others, ... spitting at other residents, [and] unacceptable loud and unnecessary noise." They also ignored court orders to cease and desist. The governing legislation, the *Strata Property Act*, S.B.C. 1998, c. 43, s. 173, gave the courts powers to (a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the bylaws or the rules; (b) order an owner, tenant or other person to stop contravening this Act, the regulations, the bylaws or the rules; (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

The British Columbia Court of Appeal held that (c) included the power to order the Jordisons to sell their unit. The Jordisons argued that such an order was an abrogation of their right to property and could only be made if the legislation expressly authorised it. The BCCA agreed that its order did take away property rights, but based their order on two factors. First, enforcement of the non-interference provision would be "stymied" if only lesser measures (fines, injunctions) could be employed but were, as in this case, ignored. Second, this was a case involving competing property rights: "The scheme of the Strata Property Act includes the property rights of other owners of the strata.... The ... private property interest [of the Jordisons] ... must yield to the rights and duties of the collective.... The old adage "a man's home is his castle" is subordinated by the exigencies of modern living in a condominium setting."

Impairment of the Safety of any person. Section 66 allows eviction for an act or omission done in the residential complex which "seriously impairs" or "has seriously impaired" the safety of "any

RELIEF FROM EVICTION

The relief from eviction section, similar to relief from forfeiture in commercial tenancies, is s. 83. It permits the Board not to evict despite the fact that the landlord has fully made its case. S. 83 (2) makes consideration of relief mandatory; this section was introduced in response to the fact that some tribunal adjudicators seemed to believe that relief should be given only in exceptional cases. It codifies *Toronto Community Housing Corp* v. *Greaves* [2005] O.J. No. 1518 (Div Ct) in which the Divisional Court held that a failure by a tribunal adjudicator to even consider whether it was applicable to grant relief constituted a legal error.

There are a number of court decisions to the same effect as Carnwarth J's statement in *Britannia Glen Co-operative Homes* v. *Singh*, unreported, 1996, Ont. G.D., that "eviction should be ordered as a last resort... Short of losing one's liberty, the loss of one's home is as serious a matter as can be imagined."

As with commercial tenancies, relief decisions seek to balance the tenant's interests with those of the landlord. The harm to the landlord's economic and/or reputational interests is considered against the seriousness of the conduct and the tenant's circumstances, especially tenants in rent-geared-to-income housing. Relief is usually given in non-payment of rent cases, with of course repayment terms imposed. It is rarely given in drug trafficking cases. When it is given it is invariably given with conditions. For example, in a number of drug trafficking cases where the perpetrator was the adult child of the tenant and an occupant of the rental unit, the condition was that the child move out.

A not untypical relief case is *Re Metropolitan Toronto Housing Authority and Pennant* (1991), 81 D.L.R. (4th) 404 (Ont. G.D.). Karen Pennant's apartment was searched by police and a loaded, restricted and stolen firearm discovered. In considering the application for a termination of the tenancy Corbett J. accepted Pennant's argument that the search warrant was invalid, but refused to exclude the evidence from the proceedings. He then found as a fact, on the civil standard, that Pennant had "permitted the unlawful act of possession of a prohibited weapon". However, he refused to grant the application for termination, stating at p. 412: "The tenant resides at the premises with her four-year-old son. She has no criminal record and there has been no previous difficulties with this tenant during her two-year tenancy. In these circumstances and since the overall case for the landlord was not compelling, I will not grant the writ of possession. For these reasons, the application will be dismissed upon condition that no hand-guns or firearms be permitted in, on, or at the subject premises at any time."

As the *Jaffer* case discussed above indicates, relief from eviction is available when the eviction is based on personal occupation. Similarly to Jaffer, in *Horst* v. *Beingessner*, 2002 Carswell Ont 5019 (ORHT), the tribunal granted relief for a tenant of 18 years standing although it accepted that the landlord was in good faith in wanting her father to move into the unit. The adjudicator held that the unit was not 'required' for personal occupation because other units in the building were available. Does it make sense to say, on the one hand, that s. 48 has no "reasonableness" requirement, and then say that s. 83 can be invoked because the landlord had other options?

PROBLEM

How would you advise Landlord? Alison Abercrombie is a single mother and the tenant of an apartment in Swansea Mansions, an apartment building in Toronto owned by Landlord. She has been a model tenant for over ten years, and pays what is by market standards a fairly low rent, which is important to her because she works as a nurse's aide in a local hospital and has a low income.

Alison's 21 year-old son Bennie lives with her. Bennie has unfortunately fallen in a with a "bad crowd," who engage in various forms of criminal activity. They import guns illegally across the border, and sell the guns and cocaine on the street. Bennie does not take any part in these activities, but he enjoys the thrill of hanging around with the people who do.

Because they are known to the police and subject to police searches of their apartments, Bennie's friends don't keep the guns and cocaine at their own homes. Instead they give the goods to Bennie who keeps them until his friends have buyers. Bennie's friends never come into Alison's apartment or into the building; they give the stuff to Bennie when they meet elsewhere, and when they want it back Bennie takes it from his room and meets up with them to hand it over. Bennie never takes and stores any ammunition for the guns; he is afraid of loaded guns.

In return for helping out his friends, Bennie gets "tips" from them, which is his only income as he is unemployed. From time to time he gives his mother money to help out with the rent. Alison did not know about any of Bennie's activities, although she did know he smoked marijuana. She was a bit puzzled at the fact that although he was not working he occasionally had money, and suspected he was doing something he should not have been doing, especially as she knew that he had "bad" friends and at one time used to warn him about them. But she also thought it was more or less impossible to control a 21-year old, and was confident that if he was doing something wrong it was being done outside the apartment. Also, she was glad when he gave her money towards the rent, as it made her life a bit easier.

A month ago the police, who had been watching Bennie's friends and noticed that a duffel bag was often swapped over when he met with them, obtained and executed a search warrant for Alison's apartment. In Bennie's room they found 10 handguns, a substantial quantity of cocaine, and a small amount of marijuana. Bennie has been charged with possession of illegal firearms, possession of cocaine for the purpose of trafficking, and possession of marijuana. His case has not yet come to trial, and he is free on bail.

Landlord has recently found out about all this, and wants to evict Alison Abercrombie.